

1 manager of WRBR?

2 THE WITNESS: Not at that -- no. Let me also say
3 this, though, Judge. He did not say I could not continue
4 with the plans that I was making.

5 JUDGE CHACKIN: When did you make these plans?

6 THE WITNESS: In April.

7 JUDGE CHACKIN: You started these plans in April?

8 THE WITNESS: Uh-huh.

9 JUDGE CHACKIN: So you are saying at no point
10 were you ever appointed general manager of WRBR? You just
11 assumed that position?

12 THE WITNESS: I don't know if there were other
13 people considered for the job. Yes, maybe that was
14 presumptuous on my part, but I was I think in a position to
15 do so and did.

16 JUDGE CHACKIN: What do you mean, you were in a
17 position to do so?

18 THE WITNESS: I was so familiar with the
19 operation. I knew more about that operation than any other
20 candidate could for the job, and I simply -- I don't know if
21 Mr. Hicks' demeanor towards me changed. Was it one way
22 before and a different way the next meeting? I don't
23 believe it was.

24 I know we discussed the things that we wanted to
25 do. Again, he did not tell me I couldn't proceed the way

1 that I'm talking to him about it.

2 JUDGE CHACHKIN: He did not tell you that you
3 could proceed?

4 THE WITNESS: No. He did not tell me that I
5 couldn't proceed.

6 JUDGE CHACHKIN: But did he tell you that you
7 could proceed?

8 THE WITNESS: No. I just went ahead and made some
9 of those changes.

10 JUDGE CHACHKIN: So you have never really
11 officially been named general manager of WRBR by anyone in
12 ownership?

13 THE WITNESS: Dave has referred to me as we've
14 been to national radio programs, seminars. He's introduced
15 me to fellow broadcasters in Michigan, and he has introduced
16 me as my general manager in South Bend at WRBR. There's no
17 question in my mind of my role in that operation. This is
18 an endorsement of Dave to third parties.

19 I'm trying to think when would that have occurred
20 the first time, but it would have been in 1994.

21 JUDGE CHACHKIN: Do you recall when in 1994?

22 THE WITNESS: No.

23 JUDGE CHACHKIN: What triggered it in April, 1994,
24 that you say that is the date that you became general
25 manager? Were you not acting or filling that role prior to

1 that time?

2 THE WITNESS: No.

3 JUDGE CHACHKIN: You were not?

4 THE WITNESS: Vince Ford was.

5 JUDGE CHACHKIN: Until when?

6 THE WITNESS: April 1, 1994.

7 JUDGE CHACHKIN: So you are saying prior to April,
8 1994, you had nothing to do with WRBR?

9 THE WITNESS: No. I wasn't the general manager
10 prior, but --

11 JUDGE CHACHKIN: What role did you have?

12 THE WITNESS: I was the general manager of the
13 sales operation at WRBR.

14 JUDGE CHACHKIN: Anything else?

15 THE WITNESS: And I was general manager of WLTA.
16 Just the sales. Just Radio One, as it was called.

17 JUDGE CHACHKIN: What did you have to do with the
18 sales of WRBR prior to April 1? What was your role?

19 THE WITNESS: Well, prior to April 1, 1994, from
20 the time that I got there in October, 1993, I was general
21 manager of Radio One, and that was the sales operation of
22 both radio stations. One sales staff, two stations. At
23 that time, you know, I had day to day contact with
24 salespeople who were selling WRBR and WLTA combined.

25 JUDGE CHACHKIN: What was the role of your

1 predecessor at WRBR prior to the time that you became
2 general manager?

3 THE WITNESS: Vince Ford was the general manager,
4 vice-president and general manager of WRBR. His office was
5 located at WRBR's studios.

6 JUDGE CHACHKIN: But he had nothing to do with
7 sales at WRBR?

8 THE WITNESS: That's right.

9 JUDGE CHACHKIN: So his area was just programming?

10 THE WITNESS: Yes. Office matters, programming,
11 collection, I'm sure. He had been a long-time employee of
12 Booth and had been at that radio station for many, many
13 years.

14 I don't know what -- we did not have joint
15 meetings or anything. I saw him between October of 1993 and
16 April of 1994 a limited number of times.

17 JUDGE CHACHKIN: What did you discuss with him?
18 What was the reason for these meetings?

19 THE WITNESS: I would be bringing material to the
20 radio station that was generated by the sales department,
21 tapes or scripts. Only in that function. What his duties
22 were there, I don't know.

23 JUDGE CHACHKIN: Go ahead, counsel.

24 BY MR. GUZMAN:

25 Q Maybe this will help, Mr. Kline. Who was the

1 owner of WRBR prior to April 1, 1994?

2 A Booth.

3 Q So Mr. Ford was Booth's employee?

4 A Yes.

5 Q When Booth ceased to be the owner of WRBR, did Mr.
6 Ford cease to be the general manager?

7 A He did.

8 Q Why was that?

9 A Mr. Hicks didn't hire him.

10 Q Do you know when the closing on Radio Station WRBR
11 was transferring ownership from Mr. Booth to Mr. Hicks?

12 A The closing?

13 Q Yes.

14 A The day before April 1.

15 Q That was March 31, 1994?

16 A Of 1994.

17 MR. GUZMAN: I have no other questions at this
18 time, Your Honor.

19 JUDGE CHACHKIN: Any further cross?

20 MR. HALL: No, Your Honor.

21 MR. GUZMAN: One quick clean up item, Your Honor.
22 I would like to move for the admission of Mass Media Bureau
23 Exhibit 100.

24 JUDGE CHACHKIN: The Bureau has no objection, I
25 take it?

1 MR. SHOOK: No. We thank counsel.

2 JUDGE CHACHKIN: All right. Mass Media Bureau
3 Exhibit No. 100 is received.

4 (The document referred to,
5 having been previously marked
6 for identification as Mass
7 Media Bureau Exhibit No. 100,
8 was received in evidence.)

9 JUDGE CHACHKIN: All right. You have no further
10 cross-examination.

11 Do you have any cross-examination, Mr. Crispin?

12 MR. CRISPIN: No, sir.

13 JUDGE CHACHKIN: Any redirect?

14 MR. BOYCE: Just a little bit.

15 JUDGE CHACHKIN: Go ahead.

16 REDIRECT EXAMINATION

17 BY MR. BOYCE:

18 Q When Mr. Turner complained about Mr. Dille, at
19 that time was Mr. Turner an employee only of WRBR?

20 A This was after the format change. Yes, he was an
21 employee of WRBR.

22 Q So did you have any understanding as to why he
23 should be concerned about what Mr. Dille thinks because he
24 did not work for Mr. Dille at that time?

25 A No, but at the same time people in the business

1 were complimenting Mr. Turner for his brilliant launch of
2 this new radio station. By its absence, Mr. Dille's
3 comments were noticeable, or in this case not noticeable.

4 Q Now, with respect to the meetings of the on-air
5 staffs of WBYT and WRBR, was that a function of the fact
6 that the stations did have different formats, and,
7 therefore, there was no reason that an on-air person for one
8 should go to a meeting of the other?

9 A That's correct.

10 Q Now, you indicated that you felt you had no
11 problem or no conflict between your dual roles because the
12 stations' formats were dissimilar. Is that correct?

13 A That's right.

14 Q Is it not part of your job to decide what or at
15 least to contribute to the decision as to what the format of
16 the stations are?

17 A Yes.

18 Q So there could have been a conflict if you were
19 considering a format for one that would be in competition
20 with the format of the other?

21 A Hypothetically. I think my job would be more
22 difficult if the formats were similar. They're not.

23 Q Do you know whether the Bob and Tom Show came to
24 be carried on any Pathfinder stations?

25 A Yes, it has been.

1 Q What stations has it been carried on?

2 A It is broadcast in Fort Wayne.

3 Q Was that before or after it went onto WRBR?

4 A I don't know.

5 Q Do you know?

6 A No. I think it -- no. I believe it was on the
7 air in Fort Wayne before it was on the air on WRBR.

8 Q Was it carried on any Michigan area Pathfinder
9 stations?

10 A I don't believe so.

11 Q Now I am going to refer to Pathfinder Exhibit 4,
12 if I can find it.

13 MR. GUZMAN: It is Tab No. 78.

14 MR. BOYCE: 78? Thank you. I did not write down
15 the old number.

16 BY MR. BOYCE:

17 Q On the second page of this, there is a dollar
18 amount circled. I believe it is \$75,000. Do you know what
19 that number refers to?

20 MR. HALL: Your Honor, I am going to object to the
21 extent that Mr. Boyce is testifying as to what that number
22 is rather than asking the witness, whose handwriting it is.
23 It does not appear necessarily to me that that is what this
24 document says.

25 MR. BOYCE: I agree with that. I would rephrase

1 the question.

2 BY MR. BOYCE:

3 Q Do you see the circled --

4 A I see a dollar amount circled. I'm not sure.

5 It's \$75,000 or \$15,000.

6 Q Okay. Do you have any idea what that would refer
7 to?

8 A No. It could have been a number of things.

9 Q What might it have been?

10 A It could have been a proposed expense for
11 television advertising to launch this new format. It could
12 have been for new stationery for the new format. I don't
13 know what it refers to.

14 Q Could it refer to a payment that had to be made to
15 the University of Notre Dame in order to free up the Bob and
16 Tom program?

17 MR. GUZMAN: Objection, Your Honor. Speculative.

18 JUDGE CHACHKIN: Well, if the witness knows.

19 THE WITNESS: I don't know, Your Honor.

20 BY MR. BOYCE:

21 Q Now if you would turn to Pathfinder 5, which is
22 No. 122 in the Pathfinder binder?

23 A Yes. I have it.

24 Q In the beginning of the text it says, "WRBR has
25 been a sub-optimized product. We have assumed that while

1 the station's oldies position is viable as a complement to
2 B100..." Do you know what B100 refers to?

3 A To WBYT.

4 Q Do you have any understanding as to what it means
5 to refer to WRBR as a complement to WBYT?

6 A I can assume. I don't know what the author had in
7 mind.

8 JUDGE CHACHKIN: There is no need to assume. If
9 you do not know, just say that.

10 THE WITNESS: I don't know.

11 BY MR. BOYCE:

12 Q Do you agree that WRBR had been, up to that point,
13 a sub-optimized product?

14 A It was still building.

15 Q I believe you testified that you would consult
16 with Mr. Hicks as to hiring an employee who had a very high
17 salary. Is that correct?

18 A Unusual expense I would discuss with Mr. Hicks,
19 yes.

20 Q Can you give any examples of employees whose
21 salaries were such that you felt you had to check with Mr.
22 Hicks before you hired them?

23 A I discussed with Mr. Hicks a shared employee that
24 I wanted to hire.

25 Q And who was that?

1 A Brad Williams. He was a general sales manager and
2 was such a talent that it was going to be a larger
3 expenditure than -- it was going to be a large expenditure,
4 and I would ask Mr. Hicks about that, yes.

5 Q How much larger an expense from the prior occupant
6 of that position was Mr. Williams likely to be?

7 A I don't remember dollar amounts. \$10,000 a year.
8 \$15,000 a year. I don't remember the amounts.

9 Q That is the total amount, within that range of
10 \$10,000 to \$15,000, or is that Mr. Hicks' share?

11 A No. That would have been the total amount.

12 Q Is there anybody other than him that you can
13 recall that you cleared with Mr. Hicks?

14 A We've had discussions about existing salespeople
15 on his staff; not the hiring of them so much as the
16 retaining of them.

17 Q But no other person that you can think of as far
18 as a hire?

19 A I don't believe there were any surprises to Mr.
20 Hicks. We may not have talked about it in sums of dollars
21 and what was going to be necessary. I can't think of a
22 specific. I do remember Mr. Williams.

23 Q Is it not true that under the joint sales
24 agreement all of the sales employees are considered
25 Pathfinder employees?

1 A That's correct.

2 Q If you would look at Mass Media Bureau Exhibit 94?
3 I do not know whether you have it.

4 A Which binder is that?

5 Q This is in Volume 3. On page 8, I am referring to
6 a personnel summary for Sarah D. Dille Aerlocker. Am I
7 correct that this indicates that she resigned on May 2,
8 1998, Reason, returning to school?

9 A Yes, except I'm having difficulty reading that
10 date.

11 Q When did you terminate her, from your
12 recollection?

13 A She resigned to return to school. I don't
14 remember the date. I'm looking at this. I have a problem
15 reading this.

16 Q I believe you testified that you terminated her.
17 Do you remember, based on your recollection, when that
18 occurred?

19 A No. She had more than one position. She also
20 worked in promotions for awhile. The time that I terminated
21 her was in sales.

22 JUDGE CHACHKIN: So you did not terminate her from
23 the station?

24 THE WITNESS: Yes.

25 JUDGE CHACHKIN: Pardon me?

1 THE WITNESS: I did.

2 JUDGE CHACHKIN: I thought she went on to
3 promotions.

4 THE WITNESS: No. I think promotions was prior to
5 that.

6 JUDGE CHACHKIN: Did she work at the station twice
7 and then she resigned the second time or what?

8 THE WITNESS: Yes. She was there at different
9 times as we had something available. It was not a
10 continuous employment in different positions.

11 JUDGE CHACHKIN: But I believe you testified that
12 you terminated her or fired her --

13 THE WITNESS: Yes.

14 JUDGE CHACHKIN: -- because her work was
15 unsatisfactory.

16 THE WITNESS: As a salesperson. That is correct.

17 JUDGE CHACHKIN: What happened then after you
18 terminated her as a salesperson?

19 THE WITNESS: She did not work at the radio
20 station for a period of time. I don't remember when that
21 occurred. There may have been a position after that that
22 she did work there.

23 JUDGE CHACHKIN: Can you tell us to the year maybe
24 when you fired her? Was it in 1996? 1997?

25 THE WITNESS: It was in 1996. Sarah has a young

1 child now, and it was prior to that. It would have been in
2 1996.

3 JUDGE CHACHKIN: Is this entry correct or not
4 where it says she resigned to return to school on 5-2-96?

5 THE WITNESS: Yes, that entry is correct. I had
6 trouble reading it. I believe counsel suggested that was
7 5-2-98. I can't make it out on mine, but I believe that is
8 5-2-96. At that time she returned to school.

9 JUDGE CHACHKIN: And then she came back?

10 THE WITNESS: She came back.

11 JUDGE CHACHKIN: This document, does it reflect
12 that she was at any point terminated?

13 THE WITNESS: This document does not say that.

14 JUDGE CHACHKIN: Do you have any documents which
15 do say that? Do you know of any such documents?

16 THE WITNESS: The document on page 9 is a document
17 that indicates her start of employment. Now, there would be
18 a follow up document that would look very much like this --
19 it's an exit document -- that would indicate her eligibility
20 for rehire and so forth.

21 That is not as a matter of practice done on the
22 same report as the hiring because that has already gone to
23 the payroll department. They have it physically in the
24 payroll department, so at the time of the termination I
25 would create a new duplicate report that is identical to

1 page 9, and it would indicate the bottom half of that
2 termination of employment.

3 JUDGE CHACHKIN: Did you in fact prepare such a
4 document?

5 THE WITNESS: I would have to go back and look.
6 There may have been other instances where an exit document
7 was not done where we simply stopped paying people, and they
8 were terminated.

9 JUDGE CHACHKIN: This termination occurred when,
10 did you say?

11 THE WITNESS: I believe, and I don't know the date
12 here from what I'm looking at. I believe it would have been
13 in 1996.

14 JUDGE CHACHKIN: When in 1996?

15 THE WITNESS: I don't know.

16 JUDGE CHACHKIN: According to this thing, she left
17 to return to school. Is this college we are talking about?

18 THE WITNESS: Yes.

19 JUDGE CHACHKIN: When did she come back in 1996?

20 THE WITNESS: It may have been prior or after this
21 point in time.

22 JUDGE CHACHKIN: Well, if there is a document
23 discharging her, I think it should be in the record in light
24 of your testimony that you discharged this person
25 notwithstanding that she is a relative of Mr. Dille. I

1 assume if there is not such a record introduced, then that
2 did not happen.

3 Return to questions, counsel.

4 BY MR. BOYCE:

5 Q Would you look, Mr. Kline, at Mass Media Bureau
6 Exhibit 70? This is in Volume 3. I believe you testified
7 that eight to ten full-time employees came over from Booth
8 or were hired from Booth.

9 If you look at Exhibit 70, that is an annual
10 employment report for the pay period covering April 1, 1994.
11 Have you seen this before?

12 A No, I have not.

13 Q Do you recognize the signature on it?

14 A I do. It's David Hicks.

15 Q Does this document indicate that there were fewer
16 than five full-time employees?

17 MR. HALL: Objection as to relevance if this
18 witness testifies about what this document says if he has
19 not seen it before.

20 MR. BOYCE: Well, Your Honor.

21 BY MR. BOYCE:

22 Q Does this reflect your recollection that there
23 were fewer than five full-time employees on April 1?

24 A Yes. At the time of this document, April 1, as
25 indicated in the footnote to page 1, there were no full-time

1 regular employees as of April 1, 1994. All the employees
2 were temporary and on probation.

3 They had been hired after settling out, if you
4 will, at Booth and started their employment with Hicks on
5 April 1. All were on probation at that time.

6 MR. SHOOK: Your Honor, a minute, please?

7 JUDGE CHACHKIN: Okay.

8 (Pause.)

9 MR. BOYCE: No further questions, Your Honor.

10 JUDGE CHACHKIN: What are you going to do about
11 that 1996 deposition of this witness? Are you introducing
12 it, or what are you going to do with it?

13 You provided a letter in which you said you were
14 going to just mark parts of it. What are you going to do
15 about it?

16 MR. SHOOK: Your Honor, when we finish with Mr.
17 Watson, we are going to go through and mark our offer
18 relative to Exhibits 1 through 4.

19 JUDGE CHACHKIN: Rather than allow Mr. Dille to
20 see it?

21 MR. SHOOK: Do you mean Mr. Kline?

22 JUDGE CHACHKIN: Yes.

23 MR. SHOOK: We were going to do it at the
24 conclusion of our presentation. Otherwise what we have is
25 part of an exhibit in and the rest of it perhaps not at that

1 time. I would just as soon do it all at once.

2 JUDGE CHACHKIN: I just want to make sure that we
3 do not run into a situation where you want to introduce
4 parts of the deposition which you have not asked questions
5 of this witness, and we run into a problem if the witness
6 has not had an opportunity to respond, to explain his
7 answer.

8 MR. SHOOK: All right.

9 JUDGE CHACHKIN: Once the witness leaves, he will
10 not be here to be able to explain his answer.

11 MR. SHOOK: Your Honor, give me a minute.

12 (Pause.)

13 MR. SHOOK: Your Honor, we are offering Mass Media
14 Bureau Exhibit 3, pages 188 --

15 JUDGE CHACHKIN: What number is it?

16 MR. SHOOK: It is Mass Media Bureau Exhibit 3.

17 JUDGE CHACHKIN: Yes.

18 MR. SHOOK: The first volume.

19 JUDGE CHACHKIN: What pages?

20 MR. SHOOK: 188 through 192, subject to that
21 limitation that we had expressed in the letter that we had
22 sent to you with copies to all parties.

23 JUDGE CHACHKIN: All right. Is there any
24 objection?

25 MR. GUZMAN: Yes, there is, Your Honor.

1 JUDGE CHACHKIN: All right.

2 MR. GUZMAN: We object to the introduction of the
3 entirety of the section designated, what has been used for
4 whatever purpose it has been used, and is now part of a
5 record.

6 Everything else is wholly improper under the rules
7 of this proceeding, and it sets up the unfair possibility
8 that later, once Mr. Kline is not here, that the record is
9 used as a fly speck to compare various aspects of what was
10 said in his first deposition to what was said in his second
11 deposition with what was said in this proceeding.

12 For that precise reason, Rule 1.321 does not
13 permit it. Therefore, we object.

14 JUDGE CHACHKIN: What does not permit it? What
15 rule?

16 MR. GUZMAN: Rule 1.321 of the Commission's rules.

17 JUDGE CHACHKIN: Does not permit it?

18 MR. GUZMAN: It does not.

19 MR. SHOOK: Your Honor, I would beg to differ.

20 JUDGE CHACHKIN: Wait a minute. Let me see what
21 the rule says.

22 MR. SHOOK: We would make reference to 1.321(d) as
23 allowing this deposition testimony in.

24 JUDGE CHACHKIN: And you are putting it under
25 what? Under (d) what, (d)(1)?

1 MR. SHOOK: (d) (2).

2 JUDGE CHACHKIN: Pardon me?

3 MR. SHOOK: (2).

4 JUDGE CHACHKIN: Why does that not apply, counsel?

5 MR. GUZMAN: Your Honor, the deposition from 1996
6 did not involve any of the parties to this proceeding. It
7 is really the same argument that the Bureau used to try to
8 admit the Sackley affidavit.

9 This deposition was taken in connection with civil
10 litigation involving Dave Hicks personally and the Crystal
11 Radio Group, none of whom are parties before this
12 proceeding. That is why Subsection (d) (2) does not apply.

13 JUDGE CHACHKIN: What difference does it make? If
14 this is a prior statement that he gave and if he was a
15 principal or officer, director or managing agent, why can we
16 not use his admissions regardless of what the source is?

17 MR. GUZMAN: Because he is --

18 JUDGE CHACHKIN: Was it a cocktail party, for
19 instance, --

20 MR. GUZMAN: Your Honor, he --

21 JUDGE CHACHKIN: -- where he made the statements
22 which were adverse to his client's interests? Why could
23 that not be used?

24 MR. GUZMAN: Your Honor, Mr. Kline is an officer
25 of Hicks Broadcasting, I believe, or an agent, but Hicks

1 Broadcasting was not a party.

2 JUDGE CHACHKIN: What difference does it make? I
3 said it could be if he made statements at a cocktail party.
4 What difference would that make? Why could you not use
5 those statements of he made statements adverse to the
6 interests of his --

7 MR. GUZMAN: Your Honor, Rule 1.321(d)(2)
8 contemplates that non-party testimony, whether under oath or
9 not, can be used for impeachment, but for no other purpose.
10 In other words, it is not admissible for any other purpose.

11 JUDGE CHACHKIN: It is not admissible as an
12 admission under the Federal Rules of Evidence? An agent of
13 a principal is not admissible as an admission?

14 MR. JOHNSON: Judge, can I add one thought to
15 that?

16 JUDGE CHACHKIN: Yes.

17 MR. JOHNSON: Under the Federal Rules of Evidence,
18 an agent of a principal is admitted as a party as against
19 that principal.

20 JUDGE CHACHKIN: That is right.

21 MR. JOHNSON: There is no argument that Mr. Kline
22 would have testified as an agent or a principal with respect
23 to Pathfinder in that prior proceeding. Pathfinder was not
24 a party, had no opportunity to prepare him. He may have
25 been testifying as an agent or a principal, but not an agent

1 of or a principal of this party.

2 Just as I might give a deposition as an agent or a
3 principal of some party, it would not be admissible in any
4 proceeding against any other party.

5 JUDGE CHACHKIN: Why not?

6 MR. JOHNSON: Because I am not an agent or a
7 principal of that party.

8 JUDGE CHACHKIN: But the fact --

9 MR. JOHNSON: And I think that --

10 JUDGE CHACHKIN: The time you testified has no
11 bearing on whether or not you are an agent or a principal.
12 What is important is whether you are an agent or a principal
13 and, therefore, what you say, as I say, even at a cocktail
14 party could be held against the principal.

15 MR. JOHNSON: And who is the principal I think is
16 the question.

17 JUDGE CHACHKIN: Pardon me?

18 MR. JOHNSON: And who is the principal is the
19 question.

20 JUDGE CHACHKIN: The principal is Pathfinder --

21 MR. JOHNSON: Well, he did not testify --

22 JUDGE CHACHKIN: -- and Hicks.

23 MR. JOHNSON: That is precisely my point, Judge
24 Chachkin. He did not testify in the prior proceeding as an
25 agent or a principal of Pathfinder.

1 JUDGE CHACHKIN: What I am saying is it does not
2 matter in what capacity he testified if in fact he is an
3 agent or principal.

4 MR. JOHNSON: The notion of agent or principal
5 admissions is an authorized admission by the principal. You
6 are speaking on my behalf, so it is not only not irrelevant.
7 It is everything.

8 JUDGE CHACHKIN: Let's look at the Federal Rules.
9 Where does it say it has to be an authorized admission, that
10 you have to actually have --

11 MR. JOHNSON: That is what is in the agency
12 relationship is that my agents can represent me, and
13 statements by them are admissions by me, but they have to be
14 within the agency capacity.

15 JUDGE CHACHKIN: What has to be within the agency
16 capacity?

17 MR. JOHNSON: The statement that is made in order
18 to be admitted against a party as an admission has to be
19 made in the capacity as an agent for that party.

20 JUDGE CHACHKIN: That is not the way I read the
21 Federal Rules of Evidence.

22 MR. JOHNSON: Your Honor, everybody is an agent or
23 principal of someone.

24 JUDGE CHACHKIN: Right.

25 MR. JOHNSON: It does not mean the statement you

1 make in any capacity can be admitted against everyone else.

2 Mr. Shook is an agent of the FCC. I suspect if he
3 were to give a deposition that later ended up in civil
4 litigation, it would not be admitted unless those were the
5 same parties or unless the FCC was a litigant. It could not
6 be admitted against his mother.

7 JUDGE CHACHKIN: Well, let's look at the Federal
8 Rules of Evidence to see if it is so limited. I am not
9 aware of such limitations --

10 MR. SHOOK: Your Honor, if I may?

11 JUDGE CHACHKIN: -- of what constitutes an
12 admission.

13 MR. SHOOK: I am looking at Rule 801(d)(2) of the
14 Federal Rules. Frankly, I do not understand Pathfinder's
15 argument relative to this point.

16 JUDGE CHACHKIN: It may have been true in the old
17 days, but not in the new Federal Rules of Evidence. I do
18 not think it so limits it.

19 All it says here is a statement is not hearsay if
20 the statement is offered against the party and is (A), his
21 own statement either as an individual or a representative
22 capacity, or, (B), attached as a statement of which he has
23 manifested his adoption of belief in its truth, or, (C), a
24 person who is authorized by him to make a statement
25 concerning a subject, or, (D), a statement by his agent or

1 servant concerning a matter within the scope of his agency
2 or employment made during the existence of the relationship.

3 MR. JOHNSON: With all due respect, Your Honor,
4 that is exactly my point.

5 JUDGE CHACHKIN: He did make a statement within
6 the scope of his agency or employment made during the
7 existence of the relationship.

8 MR. JOHNSON: Not within the scope of his agency
9 or employment with Pathfinder, Your Honor.

10 JUDGE CHACHKIN: He was not an employee of
11 Pathfinder?

12 MR. JOHNSON: He did not make this statement in
13 the Hicks litigation within the scope of that agency or
14 employment.

15 JUDGE CHACHKIN: Was he an employee of Pathfinder
16 at this time?

17 MR. JOHNSON: Chronologically at that time he was,
18 but he was not deposed in that capacity.

19 JUDGE CHACHKIN: It does not matter what capacity
20 he is deposed.

21 MR. JOHNSON: I think that is what within the
22 scope of the agency relationship means, Your Honor. I
23 cannot imagine any other meaning for it.

24 MR. SHOOK: Your Honor, in any event, all of
25 these --

1 JUDGE CHACHKIN: It says a statement of which he
2 has manifested his adoption of belief in its truth. Here he
3 was deposed. He swore under oath. I think that comes in
4 under that.

5 MR. JOHNSON: Judge, just by counter reference to
6 the FCC's rules, it says that in the hearing or in a
7 pre-hearing, any part or all of a deposition, so far as
8 admissible, may be used against any party who is present or
9 represented at the taking of the deposition.

10 There is no dispute in this case that Pathfinder
11 was not present or represented at the taking of that
12 deposition.

13 JUDGE CHACHKIN: That may be true, but also the
14 Commission's rules provide that the Federal Rules of
15 Evidence govern in situations where there are not specific
16 rules.

17 MR. JOHNSON: Judge, maybe the horse is dead
18 across the table. I do not want to make too big a deal
19 about it, but everybody has some agency or principal
20 relationship, everyone who is employed. It does not mean
21 that any statement they would make under oath is in the
22 scope of that agency or principal relationship.

23 For example, I am an agent. In fact, I am happy
24 to say I am a principal at Latham & Watkins. Everything
25 that I might say under oath is not admissible in any

1 proceeding against Latham & Watkins unless I was being
2 deposed as a principal of Latham & Watkins.

3 I think the same would abide with respect to Mr.
4 Kline. Unless he was deposed as an agent or principal of
5 Pathfinder, his statements are not admissible as to him.

6 MR. HALL: As a concrete example, Your Honor, some
7 of the testimony from the deposition they seek to introduce
8 concerns Mr. Kline's employment over many years before he
9 came to work for Hicks Broadcasting. That cannot be
10 considered as a statement concerning his employment with
11 Hicks Broadcasting, for example, where it is cumulative.

12 That I think is an example of what Mr. Johnson is
13 talking about. Maybe we need to parse through the
14 deposition rather than offer it en masse.

15 JUDGE CHACHKIN: We certainly can parse through
16 the deposition, each deposition. Let's do it.

17 MR. HALL: The other matter, Your Honor, is there
18 is a specific rule in 1.321(d)(5) concerning the use of
19 depositions from previous matters. In this rule, unlike the
20 concordant Federal Rule, there is a specific limitation on
21 the use of depositions from previous hearings.

22 The Federal Rule says in addition you can use, and
23 I am paraphrasing. Concordant Federal Rule 32 specifically
24 says that the deposition may also be used as permitted by
25 the Federal Rules of Evidence. That is not in the

1 Commission's version of that rule.

2 It specifically says you can use a deposition from
3 a hearing, an FCC hearing, between the same parties that has
4 been dismissed. It does not make reference to also using it
5 in accordance with the Federal Rules, again unlike the
6 Federal Rules of Civil Procedure on which this is based,
7 Rule 32.

8 JUDGE CHACHKIN: There is nothing, as far as I
9 know, in the Commission's rules precluding admissions. This
10 is an admission. As far as I know, there is nothing
11 precluding this, whether it is a principal or an agent or an
12 employment. Why can that not be used as an admission?

13 MR. JOHNSON: Judge, I think an admission only
14 applies to a party admission.

15 JUDGE CHACHKIN: No, it does not.

16 MR. JOHNSON: I believe it does.

17 JUDGE CHACHKIN: I do it all the time. I do not
18 believe it does anymore. I think the Federal Rules have
19 been changed so that --

20 MR. JOHNSON: I have been wrong plenty, but I
21 cannot imagine every statement by a witness outside of the
22 context of a proceeding would, therefore, be an admission if
23 that were true.

24 JUDGE CHACHKIN: You are saying that, for
25 instance, there was an automobile accident. A truck of a

1 company, Company A, was involved in an accident, and the
2 driver said the reason that I could not stop was because the
3 boss at Company A refused to fix my brakes when I told him
4 about it.

5 You are telling me that cannot be used as an
6 admission against --

7 MR. JOHNSON: No. It is a paradigm example of an
8 admission because that would be a statement by an agent made
9 within the scope of the agency relationship, therefore
10 making it an admission. I could not agree with you more
11 that that would be admissible, and that is the distinction
12 we are trying to make.

13 Mr. Kline's testimony in the other proceeding was
14 not within the scope of his agency relationship with respect
15 to Pathfinder. To bring it back to your example, he was not
16 driving our truck on that day.

17 JUDGE CHACHKIN: But he was testifying on whose
18 behalf?

19 MR. JOHNSON: On behalf of Hicks Broadcasting, I
20 believe.

21 MR. HALL: No, that is actually not correct.
22 Hicks Broadcasting was not a party in that litigation.

23 MR. JOHNSON: That is a fair point. That is a
24 fair point.

25 MR. HALL: It was Mr. Hicks and Mr. Sackley

1 individually.

2 JUDGE CHACHKIN: Well, I do not read it so
3 narrowly. We better go through the depositions.

4 MR. SHOOK: Your Honor, I do not happen to have
5 that letter with me at the moment.

6 MR. HALL: It is page 3, Lines 1 through 10; page
7 4, Line 18; page 23, Line 10. It is basically the entire
8 deposition.

9 MR. SHOOK: All right. In the first instance, I
10 am --

11 MR. JOHNSON: Mr. Shook, I apologize for
12 interrupting.

13 Judge Chachkin, my sense of this is that our legal
14 objection may be causing you inefficiency that we do not
15 need to cause. I do not know whether it is Your Honor's
16 intention to have Mr. Kline testify about these matters as
17 he is present here today.

18 If it is not your intention, I would submit to you
19 that perhaps we could work this out in a way that could
20 alleviate this problem because in its context it is
21 hypothetical.

22 If we could talk with counsel for the Mass Media
23 Bureau, it may be that there may be a way to work this out
24 or at least narrow the range of disagreement that does not
25 require Your Honor to do what we are about to do.

1 JUDGE CHACHKIN: Well, if you are willing to waive
2 your right to further examination of this witness depending
3 on what is admitted, then I am prepared to do so.

4 MR. JOHNSON: Since I do not know the purpose, I
5 am reluctant to do that, Your Honor.

6 JUDGE CHACHKIN: Well, under those circumstances I
7 think it is only four -- well, it is more pages than that.

8 MR. JOHNSON: Could we take a five minute break
9 and speak with Mr. Shook about it and perhaps narrow it?
10 Would that be an efficient way to approach this problem?

11 JUDGE CHACHKIN: Sure. Let's take a five minute
12 break.

13 (Discussion held off the record.)

14 MR. JOHNSON: Efficient is a word I am reluctant
15 to use in connection with what we have just gone through,
16 but I think it will get us through the day.

17 What we have discussed among counsel is the
18 following. That if Your Honor would allow us, Mr. Shook I
19 think is willing to move the admission of the deposition
20 sections that have been designated.

21 We would ask Your Honor to reserve ruling on that
22 for 24 hours or so, during which time the following would
23 happen. We would consider the possibility of preparing a
24 short legal memorandum on the legal topic that we have been
25 discussing and which we would share with Mr. Shook in

1 advance. He could then decide whether it was necessary to
2 respond to that.

3 With respect to Mr. Kline, the Mass Media Bureau
4 does not intend to ask him, does not have a desire at this
5 time, to ask him questions with respect to the sections that
6 it is moving in. Mr. Kline is within the control of the
7 parties. If need be, if you would allow us to reserve our
8 rights, if it is necessary in the future we could call him
9 back.

10 It is an effort really to do three things, Judge.
11 One is to end what has been a very long day for Mr. Kline.
12 The other is to give you an opportunity to consider the
13 legal arguments that have been advanced, which will be
14 relevant to all of the depositions that are being submitted,
15 and it would not be with prejudice to anybody's rights to
16 the extent that we or the Mass Media Bureau felt that
17 questioning Mr. Kline further at a future date was
18 appropriate. He is not happy about this, but available.

19 JUDGE CHACHKIN: All right. My position is,
20 unless you can show me otherwise, that this is admissible
21 under Rule 801 as an exception to the hearsay rule as prior
22 statements.

23 MR. JOHNSON: We would like the opportunity, Your
24 Honor, to try and persuade you otherwise if we may.

25 JUDGE CHACHKIN: Well, you will have to disagree

1 then with what I am reading here about the notes to the
2 Rules of Evidence, 801, --

3 MR. JOHNSON: Well, I have been wrong ten times
4 already today, Judge. It does not bother me.

5 JUDGE CHACHKIN: -- and the changes that were made
6 specifically --

7 MR. JOHNSON: I understand.

8 JUDGE CHACHKIN: -- to cover this situation.

9 MR. JOHNSON: I understand.

10 JUDGE CHACHKIN: All right. Let me ask you a
11 couple of questions myself about this.

12 First of all, in your deposition you stated quite
13 unequivocally that you were hired by Hicks. You did not
14 meet Mr. Hicks until the summer of 1994, and that was in
15 connection with some activity involving the sign company.
16 Is that correct?

17 THE WITNESS: That is correct. It was covered in
18 the deposition, and I made a mistake, Judge. I explained
19 that this morning.

20 JUDGE CHACHKIN: Well, you say you made a mistake.
21 Now, there is nothing that I read in the deposition which
22 says anything about the company set up in connection with
23 the sales agreement. It says nothing.

24 You unequivocally say over and over again that in
25 September of 1993, you were involved with WRBR and the other

1 station. Do you not say that unequivocally over and over
2 again? You do not say anything about Radio One, or am I
3 wrong? You never say anything about that you were working
4 with Radio One.

5 THE WITNESS: I don't know if that's in that
6 deposition.

7 JUDGE CHACHKIN: I was unable to find anything.
8 Now, in your testimony here you say that you talked to Mr.
9 Hicks on several occasions concerning employment as GM of
10 WRBR. In addition, that prior to the summer you saw Mr.
11 Hicks on a number of occasions in connection with the
12 station's activities.

13 I would like to know what records, if any, did you
14 consult after your 1996 deposition on which you base your
15 testimony this morning on?

16 THE WITNESS: My testimony from 1996 was not
17 prepared. I was called as a witness to that litigation. I
18 did not at that time research any records.

19 JUDGE CHACHKIN: But I find nothing in your
20 deposition which indicates that you are unclear about these
21 things or you are confused or that you are guessing. Your
22 statements appear to be unequivocal when asked the questions
23 concerning your involvement with WRBR, so --

24 THE WITNESS: What changed?

25 JUDGE CHACHKIN: Yes. What changed?

1 THE WITNESS: Well, following 1996 and in
2 preparation for this event, I understand the severity of an
3 event today that impacts me greatly.

4 JUDGE CHACHKIN: Are you saying that when you
5 testify under oath that does not impact you greatly?

6 THE WITNESS: It does, but I didn't know how to
7 prepare for that. I had no counsel. I don't believe there
8 was any preparation in advance of that deposition.

9 JUDGE CHACHKIN: I find nothing in your deposition
10 where you say I am unsure about the dates I started. Let me
11 consult my records. I am not sure. You are unequivocal
12 with your answers.

13 THE WITNESS: Those are --

14 JUDGE CHACHKIN: I want to know what records have
15 you consulted since then which we should base your testimony
16 at the hearing --

17 THE WITNESS: Today.

18 JUDGE CHACHKIN: -- to give any credibility to
19 your testimony at the hearing.

20 THE WITNESS: Probably the single most important
21 defining moment of accuracy of dates would be the hiring of
22 David Miholer in March and the discussions that went on in
23 January and February with David Miholer. Until I met Mr.
24 Hicks, I did not know David Miholer. He was a Michigan
25 broadcaster. He was an ex-employee of Mr. Hicks.

1 That's evidence very specific with the start of
2 payroll, with the start of employment, and I did not know
3 him through any other source than Mr. Hicks. We had
4 conversations about him, Judge, in early 1994 and perhaps
5 around Christmas of 1993. I had no other knowledge of him
6 except through Mr. Hicks.

7 JUDGE CHACHKIN: Is that the sole basis? Well,
8 you also testified about in addition to this incident
9 involving David Miholer. You said on several other
10 occasions you met and talked with Mr. Hicks, including
11 matters involving WRBR prior to the summer of 1994.

12 THE WITNESS: Right.

13 JUDGE CHACHKIN: What do you base that on?

14 THE WITNESS: That would be contracts for
15 employment for the Audience Development Group. Those
16 discussions were held with Mr. Hicks.

17 There is, I believe, introduced as evidence memos
18 of a meeting in May which had Mr. Hicks' name on, in
19 addition to mine, as we were talking about things that we
20 wanted to do then.

21 David Miholer's employment would be a major one,
22 and the fact that Mr. Hicks' association with Tim Moore of
23 the Audience Development Group to assess the market. This
24 was before the transfer, so those conversations had to be
25 February of 1994; very specific dates of activity that

1 indicated that I would have to have known Mr. Hicks at that
2 time.

3 JUDGE CHACHKIN: Did you discuss your deposition
4 testimony with any of the lawyers before testifying here
5 today?

6 THE WITNESS: No, I did not.

7 JUDGE CHACHKIN: The 1996 deposition?

8 THE WITNESS: I did not.

9 JUDGE CHACHKIN: Do you have any questions? Does
10 anyone have any further questions at this point?

11 All right. You are excused at least temporarily
12 unless counsel wants to call you back.

13 THE WITNESS: Thank you, Your Honor.

14 (Witness excused.)

15 JUDGE CHACHKIN: We are in recess until tomorrow.

16 MR. JOHNSON: Judge Chachkin?

17 JUDGE CHACHKIN: Yes?

18 MR. JOHNSON: One more just logistical point. In
19 order to assist with the future administration of documents
20 in this case, we would like to suggest to you that at your
21 convenience it might be easier and more efficient to take a
22 half an hour of identification of the documents that are in
23 the Pathfinder files and the Hicks files that have not been
24 previously identified as part of the Mass Media Bureau
25 exhibits.

1 We would be prepared to do that as early as
2 tomorrow morning or at any time thereafter at your
3 convenience, but I do think it will make the administration
4 of documents easier in the future than it has been today.

5 JUDGE CHACKIN: All right. We can do that
6 tomorrow morning.

7 MR. JOHNSON: Thank you, Judge.

8 VOICE 1: What time are we starting tomorrow?

9 JUDGE CHACKIN: 9:00 a.m.

10 (Whereupon, at 4:15 p.m. the hearing was
11 adjourned, to reconvene at 9:00 a.m. on Thursday,
12 October 22, 1998.)

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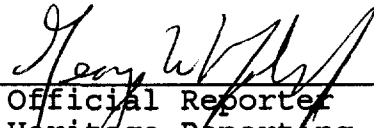
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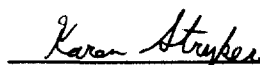
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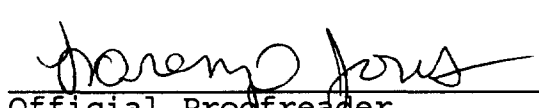
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